Supreme Court, U.S.
FILED

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No. 94 933 NOV 2 3 1994

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

VICTOR L. WILLIAMS,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

Petition for a Writ of Certiorari to the United States Court of Appeals for the Armed Forces

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PETITION FOR WRIT OF CERTIORARI

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November 1994

38 pgs

QUESTION PRESENTED

Whether the error in infringing upon the petitioner's constitutional right to cross-examine the principal witness against him was harmless beyond a reasonable doubt, where the witness was the individual allegedly aided and abetted by the petitioner, and where the existence of a mutual understanding between the two was the central issue at trial.

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No. ———

VICTOR L. WILLIAMS,
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UNITED STATES OF AMERICA,
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Petition for a Writ of Certiorari to the United States Court of Appeals for the Armed Forces

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PETITION FOR WRIT OF CERTIORARI

The petitioner, Victor L. Williams, respectfully prays that a writ of certiorari issue to review the order and judgment of the United States Court of Military Appeals entered in his case on July 22, 1994.

OPINIONS BELOW

The opinion of the United States Court of Military Appeals [1], *United States v. Williams*, USCMA Dkt No. 29744, —— M.J. —— (C.M.A. September 15, 1994), is located at Appendix A. *See*, Article 67, U.C.M.J.; 10 U.S.C. § 867. The unpublished opinion of the United

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[1] The Court has been subsequently renamed the United States Court of Appeals for the Armed Forces.

States Air Force Court of Military Review[2] affirming petitioner's conviction, *United States v. Williams*, ACM 2911, unpub. (A.F.C.M.R. March 19 1993), is located at Appendix B. *See*, Article 66, U.C.M.J.; 10 U.S.C. § 866.

JURISDICTION

The final decision of the United States Court of Military Appeals was entered on September 15, 1994. The jurisdiction of this Court is invoked under 28 U.S.C.A. § 1259(3) (Supp. 1992) and 10 U.S.C.A. § 867(a) (Supp. 1992).

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment of the Constitution provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him. . ."

STATEMENT OF THE CASE

Petitioner was convicted, contrary to his pleas of not guilty, of one charge and specification alleging the wrongful use of cocaine in violation of Article 112a UCMJ, 10 U.S.C. § 912a (1988), and one charge and specification alleging robbery in violation of Article 122, UCMJ, 10 U.S.C. § 922 (1988).

Charge II and its specification arose from the 11 November 1987 robbery of a "Box Boy" convenience store in Fairbanks, Alaska. (R. 53-54). The robbery was committed by a civilian named Mitchell Brown. (R. 58-65). The government's theory of criminality was that petitioner drove Brown to and from the scene of the crime for the purpose of effectuating the robbery, and was thereby guilty as an accessory. *See* Article 77, U.C.M.J., 10 U.S.C. 877.

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[2] The court has been subsequently renamed the Air Force Court of Criminal Appeals.

Petitioner had met Brown for the first time that evening at a party at the home of a mutual acquaintance named Valerie McNeal. (R. 60). Brown drank heavily that evening and described himself as "butched out", i.e. drunk. (R. 61). He was so inebriated that he had virtually no memory of the events surrounding the charged offense. (R. 59-61). He could recall no specifics at all, but, in response to trial counsel's leading, agreed that it was his impression that the robbery was the product of a "mutual understanding" between himself and petitioner. (R. 61).

That petitioner drove Brown to the store in petitioner's car is undisputed. When the pair arrived, petitioner parked the car about a block away and Brown went alone into the store. After robbing the clerk at knifepoint, Brown ran from the store to appellant's car. He was observed by one of the store's patron's, Mr. Darryl E. Avera. (R. 65-76). Mr. Avera drove his truck past petitioner's car and took down the license plate number. The police responded to the crime scene and Mr. Avera informed them of what he had seen.

Officer Howard Bezdek spotted petitioner's car travelling along a Fairbanks street shortly thereafter. (R. 77-78). Realizing that it matched the vehicle description provided by Mr. Avera, Officer Bezdek pulled the car over. Petitioner was driving and, as soon as the car rolled to a stop, Mitchell Brown jumped out and ran away. While he had been described as wearing a blue and red jacket at the time of the robbery, he had an orange jacket on when he fled appellant's car. (R. 78). Petitioner was advised that his vehicle matched the description of a car implicated in a robbery. (R. 79). He initially denied that anyone had been in his car at all. He then claimed that his passenger had been an unknown hitchhiker. (R. 79-80). Eventually, he told the police how he had just met Brown at Valerie McNeal's party and

had agreed to drive him to the store to buy some beer. (R. 87-89).

The crime was investigated by the local civilian police. Mitchell Brown was apprehended, tried, convicted, and sentenced to lengthy confinement by an Alaskan state court for the robbery. After a thorough investigation, the civilian authorities elected not to try petitioner as a culpable participant in the affair. Apparently, the investigators were satisfied that the petitioner was not criminally involved in Brown's activities. The Air Force, however, elected to prosecute the case before a general court-martial.

The prosecutor's key witness against petitioner regarding Charge II and its specification was Mitchell Brown, the thief. Brown's credibility was, therefore, a crucial issue. Brown admitted being so drunk that he was unable to recall much about the robbery itself. He did not even recall whether he used a weapon, stating that, if the police report said it was true, he would not dispute it.

Defense counsel moved *in limine* to prevent the prosecutor from attempting to elicit any evidence that, on the evening of the robbery, appellant may have used drugs. (R. 36-40, 55-58). Mil. R. Evid. 404(b). The military judge, recognizing the patently inadmissible nature of such testimony, sustained the objection. (R. 37). The military judge, however, then went further and forbade trial defense counsel from cross-examining the government's central witness on that *witness*'s drug use. (R. 40, 57). The judge's overly broad ruling applied to any drug use by Mitchell Brown on the night of the robbery or at any other time.

REASONS FOR GRANTING THE WRIT

The issue on appeal was whether the military judge's ruling unfairly infringed on petitioner's right to confront and cross-examine the single most damning witness against him. U.S. Const., Amend VI; *Davis v. Alaska*, 415 U.S. 308 (1974); *In re: Oliver*, 333 U.S. 257 (1948); *see, Pointer v. Texas*, 380 U.S. 400 (1965).

Generally, cross-examination should be allowed where the subject matter of the inquiry is germane to the direct examination or relates to the witness's credibility. *United States v. Rivas*, 3 M.J. 282, 285 (C.M.A. 1977).

> In the trial process, the finder of fact has the duty to search for truth and to determine the credibility of the witnesses. To assist in these functions, cross-examination serves a distinctive and vital role to test the evidence. However, "[c]ross-examination often depends for its effectiveness on the ability of counsel to punch holes in a witness' testimony at just the right time in just the right way." *Perry v. Leeke*, 488 U.S. 272, 282, 109 S.Ct. 594, 601, 102 L.Ed.2d 624 (1989).

United States v. Damata-Olivera, 37 M.J. 474 (C.M.A. 1993).

> The right to cross-examination is one of the primary interests secured by the Confrontation Clause. *Douglas v. Alabama*, 380 U.S. 415, 85 S.Ct. 1074, 13 L.Ed.2d 934 (1965). It is an important right, "critical for ensuring the integrity of the factfinding process." *Kentucky v. Stincer*, 482 U.S. 730, 736, 107 S.Ct. 2658, 2662, 96 L.Ed.2d 631 (1987). An accused's right to cross-examine witnesses against him, to test the truth of their testimony, is certainly not absolute, but must not be lightly denied.

United States v. Whitaker, 34 M.J. 822 (A.F.C.M.R. 1992).

> The extent of cross-examination with respect to an appropriate subject of inquiry is within the sound discretion of the trial court. It may exercise a reasonable judgment in determining when the subject is exhausted. But no obligation is imposed on the court, such as that suggested below, to protect a witness from being discredited on cross-examination, short of an attempted invasion of his constitutional protection from self-incrimination, properly invoked. There is a duty to protect him from questions which go beyond the bonds of proper cross-examination merely to harass, annoy or humiliate him. But no such case is presented here. The trial court cut off in limine all inquiry on a subject with respect to which the defense was entitled to a reasonable cross examination. This was an abuse of discretion and prejudicial error.

Alford v. United States, 282 U.S. 687, 694, 51 S.Ct. 218, 220, 75 L.Ed. 624 (1931) (citations omitted). *See, e.g., United States v. Davis*, 639 F.2d 239 (5th Cir., 1981) (the rule favors admission of evidence and only a substantial tipping of the scales justifies exclusion).

The United States Court of Military Appeals agreed that the petitioner's "right to confrontation was unduly limited by the military judge's ruling prohibiting such cross-examination." *United States v. Williams*, slip op. at 5. Having reached this step, the Court of Military Appeals recognized that the standard to be applied, citing *Chapman v. California*, 386 U.S. 18 (1967), and *Delaware v. Van Arsdall*, 475 U.S. 673 (1986), was whether the error was harmless beyond a reasonable doubt.

Purporting to apply this standard, the court below stated:

> In light of the record of trial in its entirety, we consider appellant to have been his own worst enemy. He gave several different accounts of the evening to police. On the night of the robbery, [pe-

> titioner] gave one story, denying he had a passenger in his car, but when questioned about the man police had seen, he claimed to have picked up a hitchhiker. The next day, he repeated the hitchhiker story, and the following day he admitted giving "Mitch" a ride to the Box Boy from Ms. McNeal's house. [Petitioner] also contacted Ms. McNeal after he was specifically instructed by the police not to do so. Given appellant's inculpatory conduct, the Court of Military Review concluded [petitioner's] "conviction . . . scarcely hinged upon Brown's . . . credibility. . . ." Unpub. op. at 4.

United States v. Williams, slip op. at 6. As a result of the above cited factors, the Court of Military Appeals found that the error in excluding the cross-examination to be harmless beyond a reasonable doubt.

At trial the prosecution, like the United States Court of Military Appeals, made much of the fact that petitioner initially disassociated himself with Brown. It is not surprising that after being told that his passenger had committed a robbery, petitioner did not want to be implicated. Petitioner, therefore, did not lie because he was involved, but because he did not want to even *appear* to be involved. While such conduct may not be laudable, it is at least understandable and in no wise proves petitioner's guilt. The civilian authorities who investigated at the time of the robbery were apparently satisfied with petitioner's explanation.

As indicated, the question is not whether petitioner drove Brown to the Box Boy store. Admittedly, he did. The relevant inquiry is whether the evidence demonstrated that petitioner knew of, approved of, or knowingly participated in Brown's criminal scheme. The only indication that he did was the testimony of Mitchell Brown —an admitted accomplice whose testimony is of little probative value in any circumstances. *United States v. Scoles*, 14 U.S.C.M.A. 14, 33 C.M.R. 226 (1963);

United States v. Allums, 5 U.S.C.M.A. 435, 18 C.M.R. 59 (1955); *United States v. Oxford*, 21 M.J. 983 (N.M.C.M.R. 1986).

To understand the significance of this testimony, a hypothetical set of facts are illuminating. If Brown had been drinking and consuming drugs, it would not be surprising that he had a bad case of the "munchies." Suppose he had no money, but convinced the petitioner to drive him to a convenience store so he could shoplift a burrito. The petitioner drops him off and waits a couple of blocks away. Unbeknownst to petitioner, Brown, in his drugged state, decides to rob the store. After Brown runs back to the car the petitioner, thinking that Brown is in possession of nothing more that a stolen burrito, drives off. Shortly thereafter, the car is spotted and stopped by the local police. Brown bails out of the car and disappears into the night leaving behind the petitioner who, believing he is in trouble for petty theft, attempts to deny his involvement.[3]

Under the above hypothetical, is the petitioner guilty of robbery? In answering this question, it is important to note that the petitioner was not charged with conspiracy. Article 81, U.C.M.J., 10 U.S.C. 881. Had he been so charged, even if only for conspiracy to shoplift a burrito, he could arguably be held liable for the other crimes of his coconspirator, including robbery. *See* Manual for Courts-Martial, Part IV, paragraph 5(c)(5), (1984). The petitioner, however, was charged as a principal to the offense of robbery under an aiding and abetting theory. Article 77, U.C.M.J., 10 U.S.C. 877. "Conspiring with another to accomplish a result is similar to—

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[3] **The purpose of this hypothetical is not to argue that the scenario set forth is what actually occurred on the night in question. It is used solely to illustrate the importance of Brown's testimony to the prosecution in meeting their heavy burden of proving the petitioner's guilt beyond a reasonable doubt. Brown was the critical link in proving that petitioner was aware he planned to commit robbery.**

but distinct from—aiding and abetting the other person to accomplish that result." *United States v. Jefferson*, 22 M.J. 315, 323 (C.M.A. 1986). While he may have intended to aid, abet, counsel, command, or procure the commission of the petty offense of shoplifting, petitioner would not be liable for Brown's decision to commit the felony offense of robbing the store clerk at knifepoint. The robbery would not be "a natural and probable consequence of the criminal venture or design" to abscond with a burrito. Manual for Courts-Martial, Part IV, paragraph 1(b)(5) (1984).

In finding the error to be harmless beyond a reasonable doubt, the court below focused on the events which occurred after the robbery, events which would be consistent with the hypothetical set forth above. The relevant issue, however, was the petitioner's intent before Brown entered the store. On this point, the prosecution relied on Brown's testimony that he and the petitioner had a "mutual understanding" that Brown was planning to rob the store. *Williams*, unpub. op. at 3. It was exactly on this point that trial defense counsel sought to cross-examine Brown.

Brown's ability to recall the existence of any "mutual understanding," and the scope of that understanding, was the critical factor in determining whether petitioner shared Brown's intent to commit the offense of robbery. Brown "was perhaps one of the more crucial witnesses, if not the most crucial, to the Government's case. As such, the military judge should have afforded defense counsel a far wider margin for cross-examination." *United States v. Stavely*, 33 M.J. 92 (C.M.A. 1991).

In the case *sub judice*, as was noted *supra*, the testimony of Brown "was 'crucial' and there was a 'real possibility' that pursuit of the excluded line of impeachment evidence would have done '[s]erious damage to the strength of the State's case.'" *Delaware v. Van Arsdall*, 475 U.S. 680, 683, 106 S.Ct. 1431, 1437, 89 L.Ed.2d

674 (1986), citing *Chapman, supra*, 386 U.S. at 319, 94 S.Ct. at 1112. The error in excluding the cross-examination "might well have contributed to the guilty verdict." *Delaware v. Van Arsdall*, 475 U.S. at 683, 106 S.Ct. at 1437, citing *Davis v. Alaska*, 415 U.S. at 319, 94 S.Ct. at 1112. As a result, reversal of the conviction is the only appropriate remedy for the violation of the petitioner's constitutional right to confront the witness against him.

CONCLUSION

The prosecution sought to establish the existence of a mutual understanding between Mitchell Brown and the petitioner in order to prove that the petitioner was criminally liable as a principal to the robbery. To do so, the prosecution presented the testimony of Mitchell Brown, the actual robber. The denial of the right to cross-examine Brown concerning his use of drugs on the night in question prejudiced the petitioner's ability to rebut the prosecution's "mutual understanding" theory. As found by the United States Court of Military Appeals, this denial was error. Moreover, contrary to the holding of the court below, such error was not harmless beyond a reasonable doubt.

Respectfully submitted,

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November 1994

APPENDICES

APPENDIX A

UNITED STATES COURT OF MILITARY APPEALS

No. 93-0930

CMR No. 29111

UNITED STATES,

Appellee

v.

VICTOR L. WILLIAMS, Staff Sergeant,
U.S. Air Force,

Appellant

Argued April 20, 1994

Decided September 15, 1994

For the Accused: *Captain Robert E. Watson* (argued); *Colonel Jay L. Cohen* (on brief); *Colonel Terry J. Woodhouse* and *Lieutenant Colonel Frank J. Spinner.*

For the United States: *Captain Jane M.E. Peterson* (argued); *Colonel Jeffery T. Infelise* and *Major Barnard N. Madsen* (on brief).

Military Judge: Mark De Ruyter

Opinion of the Court

COX, Judge:

Appellant was tried by general court-martial composed of members. Contrary to his pleas, he was convicted of

wrongful use of cocaine between October 14 and November 14, 1989, and robbery of a Box Boy convenience store on November 11, 1987, in violation of Articles 112a and 122, Uniform Code of Military Justice, 10 USC §§ 912a and 922, respectively. He was sentenced to a dishonorable discharge, confinement and forfeiture of $225 pay per month for 4 years,[1] and reduction to the lowest enlisted pay grade. The convening authority approved the sentence, and the Court of Military Review affirmed these results in an unpublished opinion dated March 19, 1993.

We granted review of the following issue:

> WHETHER THE MILITARY JUDGE ERRED TO THE SUBSTANTIAL PREJUDICE OF APPELLANT BY UNFAIRLY LIMITING THE SCOPE OF TRIAL DEFENSE COUNSEL'S CROSS-EXAMINATION OF MITCHELL BROWN.

Before trial on the merits, defense counsel requested a session under Article 39(a), UCMJ, 10 USC § 839(a), regarding a motion *in limine* to prevent introduction of evidence of any drug use by appellant on the night of the alleged robbery. While the defense sought to preclude evidence of appellant's possible drug use, it wanted to inquire into the drug use of Mitchell Brown,[2] one of the prosecution's chief witnesses, for the purpose of impeaching his memory on the evening of the robbery. Trial counsel argued that, if questions regarding drug use were to be precluded, they should be precluded as to everyone. The prosecution stated that it would elicit testimony from Mr. Brown that he had been "drinking

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[1] *See United States v. Perry*, 24 MJ 557, 558 (ACMR), *pet. denied*, 24 MJ 444 (1987).

[2] Brown had already been convicted of robbery in an Alaskan state court.

heavily" on the night in question and that his memory of the events of the evening was "not very clear." Further impeachment of Brown's memory by any drug use, according to the Government, would be cumulative. The military judge's ruling prohibited inquiry into drug use by appellant or Brown.[3]

At a second Article 39(a) session on the issue, the military judge reiterated his former ruling, *citing* Mil.R. Evid. 403, Manual for Courts-Martial, United States, 1984; the probative value of Brown's drug use, according to the military judge, was outweighed by its danger of unfair prejudice.

At trial, Ms. Kikkert testified by stipulation that, on the evening of November 11, she was working at the Box Boy convenience store mopping the floor when Mitchell Brown came in and asked her for change. Ms. Kikkert stepped behind the counter to the cash register. Brown followed her, pulled a knife on her, and demanded the money from the register. She gave him the money, and he ran away.

Mitchell Brown was also called as a witness for the prosecution. On the night in question, he went to a party at Valerie McNeal's house where he met appellant. The two left McNeal's house in appellant's car to go to the Box Boy. Brown intended to go to the Box Boy to rob the store and thought that he and appellant had a "mutual understanding" of their purpose. Brown "believe[d]" appellant "knew" he was "going in there to rob it." According to Brown, appellant waited in his car while Brown went inside to rob the store. Brown returned to

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[3] The military judge granted appellant's motion *in limine*, noting that questions regarding drug use went into an "awfully dangerous area." He apparently sought to secure an even playing field, disallowing introduction of drug use by Brown which, while potentially impeaching his testimony, might reveal uncharged misconduct on appellant's part.

appellant's car, but later "jumped out of the car and ran off." Brown was drinking alcoholic beverages "a lot" that night and admitted that his memory was "not very good." On cross-examination, Brown again admitted his memory was "fuzzy" and that "some of what" he had testified to was "based on what . . . other people" had said about the events of November 11, rather than his own personal knowledge.

While Brown did not remember any specific conversations he had with appellant about the robbery that night, he stated he knew he and appellant "did talk about what" they planned to do. Ms. Kikkert's stipulation, on the other hand, states that appellant told her that he drove Brown to the store and thought Brown was going to the store to get some "booze."

On appeal, appellant argues the only evidence implicating him in the robbery was the testimony of Mitchell Brown, an admitted accomplice, whose testimony is of little probative value. Brown admitted being so drunk he remembered little about the evening of the robbery, deferring to the statements of others as a substitute for his own memory. Appellant asserts the military judge's ruling prohibiting questions concerning Brown's drug use infringed on appellant's right to cross-examine the prosecution's most important witness. He argues such cross-examination was germane to the direct examination of Brown regarding the events of the evening and was related to the witness' ability to accurately remember. Appellant asks this Court to reverse the decision of the Court of Military Review upholding the military judge's ruling.

Evidence of Brown's drug use on the night in question was certainly relevant to and probative of Brown's ability to accurately remember the events of November 11, 1989. Mil.R.Evid. 401 and 402. Nevertheless, the military judge excluded the evidence as being substantially

more prejudicial than probative under Mil.R.Evid. 403, with no explanation as to why. If the military judge's ruling was based on potential prejudice to the Government's witness, he erred. By definition, effective impeachment evidence *should* be prejudicial to a witness. If the judge's ruling was based on potential prejudice to the accused, he erred again. While evidence Brown used drugs on the night of the robbery might have implied he used them with appellant or otherwise reflected negatively upon appellant, appellant was the proponent of the evidence and waived objection to any adverse inferences from such evidence. The military judge incorrectly applied Mil.R.Evid 403 to exclude evidence of Brown's drug use.

Turning to appellant's assertion that his right to confront witnesses against him was violated, the Supreme Court has noted that "[c]ross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested." *Davis v. Alaska*, 415 U.S. 308, 316 (1974). "The credibility of a witness can always be attacked by showing that his capacity to observe, remember or narrate is impaired." J. Weinstein, 3 *Weinstein's Evidence* ¶ 607[04] at 607-55 (1981), *quoted* in *United States v. Lindstrom*, 698 F.2d 1154, 1162 n.6 (11th Cir. 1983). Appellant was denied the opportunity to impeach Brown's ability to accurately remember by inquiring into his drug use on the night of the alleged robbery. Appellant's right to confrontation was unduly limited by the military judge's ruling prohibiting such cross-examination. Nevertheless, prejudice is not presumed; this Court must test for harmlessness. "[B]efore a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." *Chapman v. California*, 386 U.S. 18, 24 (1967). According to then-Justice Rehnquist:

> The correct inquiry is whether, assuming that the damaging potential of the cross-examination were fully realized, a reviewing court might nonetheless say that the error was harmless beyond a reasonable doubt. Whether such an error is harmless in a particular case depends upon a host of factors, all readily accessible to reviewing courts. These factors include the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the tesitmony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case.

Delaware v. Van Arsdall, 475 U.S. 673, 684 (1986).

Considering the factors articulated in *Van Arsdall*, we note Brown was the key prosecution witness in showing that appellant was a participant in the robbery of the Box Boy. There was no corroborating or contradictory evidence regarding appellant's understanding with Brown. However, Brown conceded that his memory of the night in question was poor; he admitted to being intoxicated and recalled little of what transpired that evening. Arguably, testimony that Brown could not accurately recall what happened because he was using drugs would be cumulative, as the fact that Brown's memory was extremely poor was uncontroverted. Moreover, appellant was able to conduct effective cross-examination without use of the excluded evidence.

If, based on the entire record, the reviewing court can say that any Constitutional error was harmless beyond a reasonable doubt, an otherwise valid conviction should not be set aside. *Delaware v. Van Arsdall, supra* at 681, *citing Chapman v. California,* 386 U.S. 18 (1967).

In light of the record of trial in its entirety, we consider appellant to have been his own worst enemy. He gave

several different accounts of the evening to police. On the night of the robbery, appellant gave one story, denying he had a passenger in his car, but when questioned about the man the police had seen, he claimed to have picked up a hitchhiker. The next day, he repeated the hitchhiker story, and the following day he admitted giving "Mitch" a ride to the Box Boy from Ms. McNeal's house. Appellant also contacted Ms. McNeal after he was specifically instructed by the police not to do so. Given appellant's inculpatory conduct, the Court of Military Review concluded appellant's "conviction . . . scarcely hinged upon Brown's . . . credibility. . . ." Unpub. op. at 4.

While appellant's right to confrontation was somewhat limited by the military judge's ruling, given the facts and circumstances of this case, we are convinced any error was harmless beyond a reasonable doubt. Accordingly, there has been no reversible violation of the Confrontation Clause. *Delaware v. Van Arsdall, supra* at 680.

The decision of the United States Air Force Court of Military Review is affirmed.

Chief Judge SULLIVAN and Judges CRAWFORD, GIERKE, and WISS concur.

APPENDIX B

UNITED STATES AIR FORCE
COURT OF MILITARY REVIEW

ACM 29111

19 March 1993

UNITED STATES

v.

Staff Sergeant VICTOR L. WILLIAMS,
FR241-96-7087
UNITED STATES AIR FORCE

Sentence adjudged 17 October 1990 by GCM convened at Eielson Air Force Base, Alaska. Military Judge: Mark De Ruyter.

Approved sentence: Dishonorable discharge, confinement for 4 years, forfeiture of $225 pay per month for 4 years, and reduction to E-1.

Appellate Counsel for the Appellant: Colonel Jeffrey R. Owens and Captain Michael D. Burt.

Appellate Counsel for the United States: Colonel William R. Dugan, Jr., Lieutenant Colonel Brenda J. Hollis, and Captain Thomas E. Wand.

Before
DIXON, McLAUTHLIN, and HEIMBURG
Appellate Military Judges

OPINION OF THE COURT

DIXON, Chief Judge:

Contrary to his pleas, Staff Sergeant Victor L. Williams was convicted by a general court-martial with members of wrongful use of cocaine and robbery. He was sentenced to a dishonorable discharge, confinement for 4 years, forfeitures of $225 pay per month for 4 years and reduction to the grade of E-1. The convening authority approved the sentence as adjudged. We have examined the assignments of error submitted by appellant and, finding no error, affirm.

FACTUAL AND LEGAL SUFFICIENCY

Appellant urges that we find the evidence legally and factually insufficient to support his conviction on either of the two charges. The test for legal sufficiency is whether, considering the evidence in the light most favorable to the prosecution, a reasonable factfinder could have found all the essential elements beyond a reasonable doubt. *Jackson v. Virginia,* 443 U.S. 307, 319, 99 S. Ct. 2781, 2789, 61 L. Ed. 2d 560 (1979). The test for factual sufficiency is whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, we are ourselves convinced of the accused's guilt beyond a reasonable doubt. *United States v. Turner,* 25 M.J. 324, 325 (C.M.A. 1987). Applying both tests, we find the evidence sufficient to support each of appellant's convictions.

The appellant was selected for a random urinalysis test on 13 November 1989 at Eielson Air Force Base. He

was notified early in the duty day to report to the base theater before noon to provide a sample. The next day, a review of the collection data revealed that appellant had failed to report.[1] His unit was contacted and appellant was again directed to go to the base clinic to provide a sample. The urine sample he eventually provided, when analyzed by the Air Force Drug Testing Laboratory at Brooks AFB, Texas, contained more than four times the amount of the cocaine metabolite benzolecgonine (BE) necessary for reporting samples as positive.

At trial, appellant testified he had not knowingly used cocaine, but had been drinking at a friend's house on the Saturday night before providing his urine sample. The friend was Molly Brown. Appellant stated he had several drinks and had passed out. He awoke with a nauseating headache and threw up after walking outside the house. When called as a defense witness, Molly Brown said she and her friend, Sabrina,[2] had placed some cocaine in appellant's drink without his knowledge. Ms. Brown contended that she and Sabrina had purchased $150 worth of cocaine, used two-thirds of it, and then Sabrina placed the remaining one-third in appellant's drink as a joke. During vigorous cross-examination, Ms. Brown stated she didn't use cocaine often because she couldn't afford it. Yet, she continued to maintain that she gave appellant nearly $50 worth of cocaine as a joke. The trial court obviously found Ms. Brown's testimony lacking in credibility and so do we.

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[1] Appellant testified he took his wife to the hospital on 13 November 1989 after he received a call from her saying she had fainted and was having severe pains. His wife was treated for a non-urgent urinary tract infection. Appellant stated the fact that he was supposed to provide a urine sample that day "slipped his mind." After leaving the hospital, appellant stated he took his wife to the chiropractor.

[2] Sabrina did not testify at trial since her whereabouts were unknown. Ms. Brown stated Sabrina lives in California but she did not know her address or telephone number.

Similarly, we have no difficulty finding the evidence sufficient to support appellant's conviction on the robbery charge. On 11 November 1987, the "Box Boy" convenience store in Fairbanks, Alaska, was robbed by a civilian named Mitchell Brown.[3] Brown testified that he met appellant at a party on the day of the offense. He stated he left the party with appellant who drove him to the Box Boy. According to Brown, he and the appellant had a "mutual understanding" that Brown was planning to rob the store. Brown admitted he had been so drunk that evening he could scarcely remember the details. Witnesses saw Brown leave the Box Boy, run two blocks, and enter appellant's vehicle which was parked with the motor running. The license number of appellant's vehicle was relayed to the city police. A police officer testified that when he located and stopped appellant's vehicle, he observed a man running away from the area. When questioned by the police officer, appellant first denied anybody had been in the vehicle with him. Then he changed his story, stating the man seen running away was someone he had just picked up. Eventually, he told the police he just met Brown at a party and agreed to drive him to the store to buy some beer. This "innocent errand" explanation lacks plausibility, given the fact that appellant was waiting some two blocks from the store on a freezing Alaskan night. The circumstances simply leave no reasonable doubt about appellant's complicity in the robbery.

RULING LIMITING CROSS-EXAMINATION

Appellant avers he was prejudiced by the military judge's ruling precluding trial defense counsel from cross-examining Mitchell Brown on whether he had used drugs on the day of the robbery. We disagree. The judge's ruling limiting the scope of Brown's cross-examination came after a defense motion *in limine*. Defense counsel

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[3] Brown pled no contest to the robbery charge in an Alaskan state court. He was a prisoner when he testified.

sought to preclude the prosecution from eliciting any testimony from Brown that appellant may have used drugs on the evening of the robbery. The judge granted the defense motion and, to preclude this information from being disclosed during Brown's cross-examination, instructed trial defense counsel not to ask Brown any questions concerning his own drug use. The military judge concluded the potential prejudice from allowing inquiry into Brown's drug involvement clearly outweighed its probative value. Mil. R. Evid. 403.

There can be no dispute that Mitchell Brown was a key prosecution witness in this case. We also recognize that cross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested. *Davis v. Alaska*, 415 U.S. 308 (1974). However, we do not find that the military judge's ruling in this instance unfairly infringed on appellant's right to attack the witness' credibility.

We note that strong circumstantial evidence already linked appellant with the crime. Thus, while we view Mitchell Brown as a key witness against appellant, appellant's conviction on the robbery charge scarcely hinged upon Brown's testimony or credibility alone. In addition, Brown proved to be a most uncooperative and ineffectual government witness. He could not recall the date of the robbery. He could not remember how much money he took. He could not remember using the knife he was seen wielding. And, when asked how his memory of the night in question was, he replied, "Not very good." In response to another question he stated, "I really can't recall because I was pretty butched out that night." His testimony made it blatantly obvious that he was impaired the night of the robbery. Questioning him further about his possible drug use that evening would have served no useful purpose.

REMAINING ASSIGNMENTS OF ERRORS

None of the remaining assignments of error warrant extensive comment. An affidavit filed by government ap-

pellate counsel establishes there was no break in appellant's service, eliminating any jurisdictional issue. *United States v. Clardy,* 13 M.J. 308 (C.M.A. 1982). We next find no merit in appellant's contention the military judge erred by refusing to give a special instruction how the members could consider the Article 15s and letters of reprimand trial counsel offered during the sentencing portion of the trial. Appellant's argument that the military judge needed to go beyond the standard sentencing instruction is not persuasive.

We also reject appellant's assertion that the military judge erred by denying defense counsel's motion to sever the two charges. See R.C.M. 601(e)(2) and R.C.M. 906(b)(10). Finally, we disagree with appellant's claim that his sentence is unduly severe. Article 66(c), UCMJ. On the basis of the entire record, we find no indication appellant received more punishment than he deserves for his offenses. *United States v. Healy,* 26 M.J. 394 (C.M.A. 1988).

Having examined the record of trial, the assignments of error, and the government's reply thereto, we conclude that the findings and sentence are correct in law and fact, the sentence is appropriate, and no error prejudicial to the appellant's substantial rights was committed. Accordingly, the findings of guilty and the sentence are

AFFIRMED.

Senior Judge McLaughlin and Heimburg concur.

[SEAL]

OFFICIAL

/s/ Naomi D. Allen
NAOMI D. ALLEN
TSgt, USAF
Chief Court Administrator, AFCMR

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